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No. 83-38

In The

Supreme Court of the United States

October Term, 1983

SANTA CLARA VALLEY WATER DISTRICT,
CITY OF MORGAN HILL, AND
DONALD A. LAWRIE,

Petitioners,

vs.

BRUNO MARTINO AND EUGENIA MARTINO,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the Fifth and Fourteenth Amendments to the United States Constitution guarantee an award of just compensation for unreasonable precondemnation activities which result in de facto taking of property?

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Respondents Bruno Martino and Eugenia Martino submit this Memorandum in response to the Petition of the Santa Clara Valley Water District, Donald A. Lawrie and the City of Morgan Hill for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case. The factual representations and legal theory propounded by the petitioners do

not justify a review by the Supreme Court for the following reasons:

1. Petitioners have mischaracterized the nature of this action in order to invoke a review by this Court. The underlying action does not challenge the regulatory police powers of a municipal or regional agency; nor does it challenge the authority of the federal government to engage in flood control protections. Rather, this action challenges unreasonable pre-condemnation activities. The basic underlying facts which were before the Ninth Circuit concern an 18-year government acquisition program which targeted the Respondents' property for condemnation and construction of concrete levees for a flood control district, and the attempts by those entities to extort from the landowners two-thirds of their property as a condition of development without payment of any compensation. As such, the petition presents a misleading portrayal of the nature of this action, in order to trigger the Supreme Court's consideration.

2. In a prior related decision before this Court, *San Diego Gas and Electric Company v. City of San Diego*, 450 U.S. 621 (1981), the Court addressed significantly similar issues involving the theory of "inverse condemnation" and the availability of damages for the "taking" of property. In that decision, this Court dismissed the appeal, holding that the appellate court's failure to determine whether a "taking had occurred" precluded review for lack of a final judgment (*id.* at 633). If this Court does not desire to address the issue of available remedies for inverse condemnation (damages for taking) unless a final judgment adjudicating a taking is before it, then a

hearing of the *Martino* decision would be inappropriate since the matter has been reversed and remanded to the District Court for its *first trial.* There has never been a final court determination of the alleged taking, date of taking, or measure of damages. As such, a hearing of the *Martino* matter probably would be premature in light of this Court's prior holding in *San Diego Gas.*

3. The Ninth Circuit's unanimous opinion, which upheld the Martinos' right to obtain damages for the "taking" of their property, is consistent with a century of constitutional protections embodied within the Fifth and Fourteenth Amendments to the United States Constitution, the federal Civil Rights Act (42 U. S. C. 1983) and federal constitutional case. The supportive case law is as extensive as it is continual throughout our history: the Supreme Court and lower federal adjudicatory bodies have consistently recognized that unreasonable government conduct which constitutes a "taking" of property gives rise to an award of just compensation. *Pennsylvania Coal Company v. Mahan* (1922) 260 U. S. 393, 415; *Kaiser Aetna v. United States* (1979) 444 U. S. 164; *Drakes Bay Land Company v. United States* (Court of Claims 1970) 42 Fed. 2d 574; *Foster v. City of Detroit* (6th Circuit 1968) 405 Fed. 2d 138; *Eleopaulous v. Richmond Redevelopment Agency* (Northern District of California 1972) 351 Fed. Supp. 63; *San Diego Gas and Electric, supra* (in which a majority of the court expressed an opinion supportive of just compensation for the taking of property).

4. Petitioners' remaining argument, that the Martinos may not assert their constitutional rights for the taking of their property, without exhausting all administrative remedies (however idle and futile) has been refuted by

this Court in *Patsy v. Board of Regents of the State of Florida* (1982) 102 S. Ct. 2557. In that decision, this Court unequivocally stated that federal Civil Rights Act violations are not dependent for relief upon the exhaustion of administrative remedies, and that the mere threat, let alone violation of a federal civil rights act, triggers compensation under those provisions without the necessity to exhaust any administrative remedies. The Petitioners argument that Civil Rights cases are limited to racial or sexual issues is refuted by their own brief which acknowledges that a taking of property affected by a land use regulation is properly invoked by the Civil Rights Act. *Lake County Estates Inc. v. Tahoe Regional Planning Agency* (1979) 440 U. S. 391.

CONCLUSION

Petitioners have mischaracterized the nature of this action as a challenge to standard police power regulations of a government entity, in an attempt to invoke the jurisdiction of this Court. That characterization is highly misleading, for the only challenge that was considered by the Ninth Circuit involves the issue of compensation for unreasonable pre-condemnation activities, including an 18-year acquisition project in which the acquiring agencies threatened to confiscate two-thirds of the landholders' property without payment of compensation. In a unanimous opinion, the Ninth Circuit confirmed the constitutional guarantee of just compensation for a "taking" of property, as determined by a trier of fact. The trier of fact will now determine whether that taking has occurred,

and the appropriate award for damages. The Petitioners' request is premature and inappropriate.

Respectfully submitted,

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Dated: July 1983.